

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

MI PUEBLO FOODS

Milpitas, California

Employer

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 853, a/w CHANGE
TO WIN**

Case 32-RC-5794

Petitioner

**REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION**

Mi Pueblo Foods, Inc., herein called the Employer, a California corporation with its main office located in San Jose, California, is engaged in the operation of retail grocery markets throughout Northern California and the San Francisco Bay Area. On October 1, 2010,¹ International Brotherhood of Teamsters Local 853, a/w Change To Win, herein called the Petitioner, filed a petition in Case 32-RC-5794 with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. As amended at the hearing, Petitioner seeks to represent a unit of about 15 full-time and

¹ All dates hereinafter are in 2010 unless otherwise indicated.

regular part-time distribution drivers employed by the Employer in its Milpitas, California Distribution Center, herein called the Distribution Center.

A hearing officer of the Board held a hearing in this matter on October 15 and 18. Petitioner and the Employer appeared at the hearing, and they have each filed post-hearing briefs with me, which I have duly considered.

At the hearing, the parties stipulated that any unit I find appropriate herein should not include any of the distribution center employees who work in the Maintenance Department or the Construction Department and they also agreed that the unit should not include any of the employees who work in either the Employer's corporate headquarters or its retail stores. However, as evidenced at the hearing and in their briefs, the parties disagree over whether the petitioned-for unit of distribution drivers is an appropriate stand-alone unit. At the hearing, Petitioner argued that a unit limited to the distribution drivers who drive 53 foot tractor trailers and possess a Class A license was an appropriate unit. On brief, however, Petitioner modified its position and now asserts that the driver unit should also include the two drivers (Cesar Gonzalez and Rafael Barragan) who possess a Class B commercial license and drive the 25 foot bobtail truck with air brakes and also one employee, Juan Caballero, who is classified as selector but who in the past has spent some of his working time driving a 25 foot bobtail truck without air brakes. The Employer disagrees, asserting that because all of the distribution drivers share a community of interest with the warehouse employees and the plant clericals, the smallest appropriate unit herein is a unit that includes all three of these classifications.

I have carefully considered the evidence and the arguments presented by both parties on these issues. As set forth below, I have concluded, in agreement with the

Petitioner, that a unit of drivers, including both the Class A transport drivers and the Class B bobtail drivers, is an appropriate unit. Accordingly, I am directing an election in a unit consisting of all distribution drivers employed by the Employer at its Milpitas, California Distribution Center. However, with regard to selector Juan Caballero, I have concluded that he should vote under challenge since the record contains insufficient evidence to determine whether he currently works enough hours driving a truck to be eligible to vote as a dual function employee. With regard to quality control employee Carlos Juarez, I have concluded that there is insufficient evidence to establish that he performs any driving duties. Therefore, I shall exclude him from the unit.

There are approximately 15 employees in this unit.

THE FACTS

The Employer is a California corporation engaged in the operation of a chain of retail grocery stores located throughout Northern California. The Employer operates a central distribution center in Milpitas, California, herein called the Distribution Center, from which grocery and produce supplies are trucked on a daily basis to the Employer's retail stores. The Distribution Center is about 85,000 square feet in size. There are approximately 50 warehouse employees who work at the Distribution Center; five administrative assistants (plant clericals); and fourteen drivers with Class A or B licenses.

The receiving department at the Distribution Center receives inbound deliveries of groceries and produce that arrive by truck from the Employer's vendor partners. These trucks are backed up to one of the 15 truck bays at the Distribution Center and the pallets are unloaded from the trucks and put in the staging area by the vendor's truckdriver. The Employer's quality control employees then inspect the incoming products for quality; the

Employer's inventory control employees count the product to make sure it matches the invoices; and the Employer's receiving department employees put the incoming products into the appropriate cooler or bin location.

The Employer's plant clerical employees process the invoices from the vendor partners who are dropping off deliveries; they take incoming phone calls from vendors or retail stores with questions about deliveries or orders; they have some contact with the Employer's drivers regarding the paperwork generated as part of their daily work; they input data into the Employer's computer system; and they prepare the "pick tickets" which reflect what items a particular store is ordering for delivery that day.

For outbound deliveries, the Employer's order selectors receive pick tickets from the plant clerical staff; they place an empty pallet on an electronic pallet jack; they go around the warehouse to the various bins and cooler locations and select the appropriate products off of the racks; and they place those items on the pallet. The order selectors then bring the completed pallets to the loading dock where someone from the Employer's quality control department checks the pallets to ensure that the amounts and the quality are correct. Once this is done, the pallets are shrink wrapped, the appropriate store and department labels are placed on the pallets, and the Employer's loaders load the pallets onto the trailer making sure to use proper weight distribution. Generally, all of the supplies for a particular store are loaded onto one truck. However, for smaller stores, loads for two stores may be placed on a single truck. The loaders and the management team then prepare a route guide which designates which driver will be assigned to deliver that trailer to the designated store.

The Employer's tractor trailer drivers report to work each day at around 5:00 a.m.² When they arrive at work, the drivers report to the loader to find out what route and what trailer they will be taking for their first delivery that day. The driver then gets the invoices for his delivery; he opens the trailer and checks to make sure that all of the pallets in his trailer have the delivery code for the appropriate store; he backs up his tractor to the trailer and hooks it up; he pulls the trailer out into the parking lot where he gets out of the tractor and performs a pre-delivery inspection of both the tractor and the trailer to ensure everything is working properly and the tractor trailer is safe to drive. Finally, the driver sends an e-mail to the designated plant clerical employee to advise her that he is leaving on his route, and he then drives the trailer to the designated retail store. When the driver arrives at the retail store, the driver unloads the truck. The driver and an employee from the retail store then check the load to verify the accuracy of the count and the quality of the product and, afterwards, both of them sign the front sheet to verify this. The retail store employee then brings the deliveries inside the store while the driver loads up his truck with empty pallets, cardboard, and any returns from the previous day's delivery. The driver then drives his truck back to the Distribution Center. Once he arrives, he backs the trailer in to the dock, he goes to the clerical employees' work area to drop off the paperwork from the delivery he just made, and then he returns to the loader to find out about his next delivery. The process then starts up all over again. Depending on how far the stores are from the Distribution Center, a driver may do anywhere from one to three deliveries in one day. The driver may also be required to do a backhaul, which consists of picking up incoming supplies from a vendor that is located nearby the store location of the first delivery that day and bringing those supplies back to the

² There is one Class A driver who works the afternoon shift.

Distribution Center. At the end of his last delivery for the day, the driver does a post-trip inspection on his tractor; he fills out a form indicating any repairs that need to be made to the tractor or the trailer; he fills out his driver vehicle report (DVR) sheet which records what he noticed on his inspections of his vehicle that day; and he fills out his Department of Transportation (DOT) log book or timesheet indicating the hours that he drove that day, the hours spent in the warehouse, and any other non-driving hours.

ANALYSIS

A. Community of Interest

In deciding whether a petitioned-for unit is appropriate under Section 9(b) of the Act, the Board has broad discretion, which reflects Congress' acknowledgment of the need for flexibility in shaping the bargaining unit to the particular case. *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944). The determination of whether a unit is appropriate for the purposes of collective-bargaining turns on the degree to which the employees involved share a community of interest. When the interests of a group of employees are dissimilar from those of another group, a separate unit is appropriate. See e.g. *Engineered Storage Products Co.*, 334 NLRB 1063 (2001); *Swift & Co.*, 129 NLRB 1391 (1961). However, when the interests of the group in question are not sufficiently separate from the larger group, a more comprehensive unit will be required. *Carpenter Trucking*, 266 NLRB 907 (1983); *Boeing Co.*, 337 NLRB 152 (2001). The Board will first decide whether the petitioned-for unit is appropriate. *Overnite Transportation Company*, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the “smallest appropriate unit” encompassing the petitioned-for employee classifications. *Id.* Further, as stated in

Marks Oxygen Co., 147 NLRB 228 (1964), the Board's policies regarding the unit placement of drivers, including the policy announced in *E.H. Koester Bakery Co.*, 136 NLRB 1006 (1962), did not reverse basic policies regarding unit determinations including the policy that a plantwide unit is presumptively appropriate; that a petitioner's desire as to the unit is always a relevant consideration, and that it is not essential that a unit be the most appropriate unit.

In determining whether employees share a community of interest, the Board examines such factors as (1) functional integration; (2) frequency of contact with other employees; (3) employee interchange; (4) degree of skill and common functions; (5) commonality of wages, hours and other working conditions; and (6) shared supervision. *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004).

B. Review of Community of Interest Factors

1. Functional Integration and Frequency of Contact

There is certainly an element of functional integration of the work of the drivers, the warehouse associates, and the plant clerical employees. Warehouse associates receive and store product from the Employer's vendor partners; they pick the daily orders for the retail stores; they load the completed pallets onto each driver's truck; and they process the empty pallets, cardboard, and returned product that the drivers bring back to the Distribution Center. The plant clericals process the paperwork from the vendor deliveries; they receive orders from the retail stores; they generate the pick tickets that the order selectors use to prepare the pallets for each days deliveries; they communicate with the drivers regarding the times that they leave the warehouse and arrive at the retail stores; and they process the paperwork that the drivers give them upon their return to the warehouse at the end of each delivery. The

drivers then deliver the orders by truck to the designated retail stores. The entire warehouse process functions as an integrated whole, with each employee's work dependent on the other employees performing their designated tasks.

However, while the record evidence established that the warehouse process is functionally integrated, it also established that the daily contact between drivers, plant clericals, and warehouse associates is minimal and comprises only a small fraction of each driver's work day. Indeed, drivers spend less than an hour each day at the Distribution Center, with the remainder of their work time spent away from the facility on their routes delivering product to the retail stores. The drivers' interaction with the warehouse employees occurs only for a brief period prior to the start of each delivery run when the drivers are at the Distribution Center to receive their delivery assignment from the loader and to perform their check to ensure the load matches the invoice, and for another brief period at the end of each delivery when they arrive back at the Distribution Center to turn in their paperwork. The record reflects that it is only on rare occasions that the drivers assist the warehouse associates in loading their trucks. Moreover, the warehouse associates never travel along with the drivers when they make their deliveries to the retail stores.³ Finally, with regard to their interaction with the plant clericals, the record similarly reflects that this contact is minimal. Thus, in the course of their normal workday, the drivers only interact with the plant clericals for a brief period of time when they drop off their paperwork in the customer service boxes after they have made a delivery and they advise the plant clericals if there are any returns from the retail store. The plant clericals also hand out paychecks to the drivers and

³ The drivers have some interaction with an employee from the retail store who helps the driver unload the truck and check the accuracy and quality of the delivery. But this interaction is irrelevant since no party is arguing that the drivers share a community of interest with the retail store employees.

communicate with them via e-mail to confirm the times that the drivers arrive and depart from the retail stores.

The only other evidence of employee contact comes in the form of the occasional Annual Employee Appreciation Barbecue and the annual holiday party. However, these social functions are too infrequent to establish consistent contact between employees in the driver, warehouse, and plant clerical classifications.

2. Employee Interchange

The record establishes that in order to be hired as a Class A or Class B driver, an applicant must possess a Class A or Class B driver's license, must have a minimum of five year's driving experience, and must pass a DMV check to assure that the applicant is insurable. The record further establishes that neither the possession of a Class A or Class B license nor any driving experience are requirements to be hired by the Employer as either a warehouse employee or a plant clerical; that the Employer does not provide any training to warehouse associates or plant clericals to assist them in obtaining a Class A or Class B license; and that no matter how long an employee works as a warehouse associate or a plant clerical, that employee will never become qualified as a result of that experience to obtain a Class A or B license. As a result of these undisputed facts, the record evidence established that there is no employee interchange on either a temporary or a permanent basis between plant clericals and drivers; no evidence of temporary interchange between drivers and warehouse associates; and only limited evidence of permanent interchange between drivers and warehouse associates.

With regard to these permanent transfers, since the Employer commenced operations at the Distribution Center, only two drivers have permanently transferred to an order selector

position. There is no explanation in the record for why these two transfers occurred. Since the Distribution Center opened, there has been only one permanent transfer from a warehouse position to a driver position. This employee, Ricardo Gamez Roman, was initially hired into an order selector position on May 27, 2008 and he permanently transferred to a Class A driver position on March 18, 2009. However, the record reflects that when Roman was first hired, he already had his Class A permit and he just needed to complete the driving test. Therefore, at the time of his hire, it was understood that he would be given a promotion to a driver position as soon as he passed his DMV test and the insurance paperwork was completed. This was what led to Roman's promotion on March 18, 2009. At the hearing, the Employer also offered evidence of three other employees who were hired as order selectors and subsequently promoted to a driver position. However, the record reflects that these three employees applied for positions as drivers and they already possessed the requisite Class A and B licenses. When they were hired, it was understood that they were being hired as drivers. However, the Employer temporarily assigned each of them to work for about a month as an order selector just to receive some training regarding the Employer's operations and system before it transferred each of them to their permanent positions as drivers.

In examining the above-detailed evidence of permanent transfers and employee interchange, I find that it is insufficient to establish that there is a community of interest between the warehouse employees and the drivers. To the contrary, I find the case before me to be similar to the drivers and mechanics in *Mc-Mor-Han Trucking Co., Inc.*, 166 NLRB 700 (1967), where the Board found that the hiring qualifications for drivers were separate and distinct from its requirements for mechanics, there was no indication in the record that

employees normally progress from mechanic to truckdriver, or vice versa, and the only evidence of interchange was found to be irregular and infrequent.

3. Degree of Skill and Common Functions

The record evidence established that the degree of skill and common functions of the drivers, the warehouse associates, and the plant clericals are not so similar to necessitate a combined bargaining unit. Rather, each job calls for a different skill set and requirements for hire. The undisputed evidence establishes that the duties of the Employer's driver classification include (1) performing a pre-delivery inspection of the tractor and trailer; (2) driving the Employer's product to its customers; (3) unloading the truck; (4) driving the Employer's trucks back to the Distribution Center after each delivery; (5) turning in all required paperwork to the office; (6) performing a post-trip inspection on the tractor trailer; and (7) completing all DOT required log books and DVR books. Drivers must hold either a Class A or B commercial drivers' license and have a minimum of five year's driving experience. To maintain their Class A or B commercial license, drivers must take a DMV test every time their license expires; they have to submit to DOT random drug testing; they have to maintain a medical certification; the DMV notifies the Employer every time a driver gets their license suspended or is arrested for DUI; they have to undergo DOT required driver safety testing; and they must be insurable by the Employer's liability insurance carrier.

By contrast, warehouse associates' job requirements and functions are significantly different.⁴ Warehouse associates are asked to (1) receive and inspect incoming deliveries from vendors; (2) put the deliveries into the appropriate cooler or bin locations; (3) prepare outgoing orders by filling up pallets based on pick tickets reflecting orders made by the

⁴ No warehouse associates provided testimony during the hearing.

Employer's retail stores; (4) load the driver's trucks with the appropriate type and quantity of product ordered by the retail stores; (5) operate various types of equipment in the warehouse such as forklifts, pallet jacks, and cherry pickers; and (6) receive and process any backhauls or returned products upon the driver's return. Warehouse associates are not required to have driving experience or a Class A or B Commercial drivers' license (or even a Class C license to drive a car); they do not have to submit to random drug testing; they do not have to complete any log books or comply with any DOT regulations; they are not subject to DMV notification if their license is suspended; they are not required to maintain a medical certification; and they do not have to be insured by the Employer's insurance carrier. The only minor similarities in their job functions are that each classification has to perform quality control inspections at each step of their work and drivers sometimes assist warehouse associates in unloading the trucks upon their return to the warehouse.

With regard to the equipment that they use, there are some minor similarities between the two classifications. Thus, both drivers and warehouse employees use electric pallet jacks to load and unload trucks. However, only warehouse employees drive forklifts and cherry pickers, and only drivers are qualified to drive the tractor trailers and the bobtail trucks with air brakes. Moreover, only drivers are provided with Blackberry's by the Employer, which they use to notify the plant clericals when they arrive or depart from the Distribution Center or one of the retail stores, or to advise the Employer if there is a breakdown or other problem with the truck.⁵

⁵ The degree of skills and common job functions between the drivers and the plant clericals is even more dissimilar. While the drivers work with trucks and pallet jacks and spend the bulk of their time away from the distribution center making deliveries to the retail stores, the plant clericals use telephones, copy machines, and computers to do paperwork inside the office.

Based upon the above, I find that the record evidence establishes that the degree of skill and common functions of the drivers, the warehouse associates, and the plant clericals are not so similar to necessitate a combined bargaining unit.

4. Commonality of Wages, Hours and Other Working Conditions

The drivers, warehouse associates, and plant clericals do share some common employment benefits including medical, dental, vision, and life insurance benefits; a common Annual Employee Appreciation Barbecue; and a \$15 coupon every Thanksgiving that is good for merchandise in one of the Employer's retail stores. These three classifications also receive the same new hire packet including the same employee handbook and safety handbook; they complete the same new hire orientations checklist and safety checklist; and they each receive copies of the Employer's employee newsletter. They also are subject to the same common termination and performance evaluation forms. The record also reflects that the drivers and warehouse employees use the same employee breakrooms, restrooms, and employee parking lot;

However, the record reflects that these same benefits and personnel policies apply to all of the Employer's hourly employees, including the 2500 or so employees in the Employer's retail stores that no party is contending must be part of any unit found appropriate herein. Moreover, with regard to the breakrooms and restrooms, since the drivers are out on the road for the large majority of their workday, they make minimal use of these facilities. Instead, most drivers eat their lunch in their trucks somewhere away from the Distribution Center.

With regard to their hours of work, the warehouse employees and plant clericals work different hours than the drivers. The plant clericals work day shift, with starting

times between 6 a.m. and 9 a.m., and most of them are off on weekends. The warehouse associates work various shifts, with the receiving department employees working mostly on day shift, the order selectors working mostly an afternoon/evening shift, and the loaders starting their day around 2:30 a.m. By contrast, all but one of the drivers works from 5:30 a.m. until around 1:30 p.m.

Finally, the drivers, warehouse employees, and plant clericals have distinctly different pay scales. The warehouse employees starting pay rate ranges from \$9 to \$10 an hour. With the exception of DC Operations Coordinator Magdalena Perez, who earns \$17.00 per hour, the other four plant clericals only earn from \$10.61 to \$11.30 an hour.⁶ By contrast, drivers start at \$17 an hour and they can progress to as much as \$26 an hour.⁷ The Employer testified that the reason for this higher pay scale is that it conducted a wage survey for the truck driving industry and concluded that it would have to pay these higher wage rates in order to be competitive.

5. Lack of Shared Supervision

The organizational charts presented by the Employer show largely separate supervisory channels for drivers, warehouse associates, and plant clericals. Thus, the order selectors and quality control employees report directly to the DC Floor Manager; the plant clericals, loaders, receiving, and organization team report directly to the Distribution Center Ops Manager; and the inventory control employees report to the DC Produce Ops Manager. At the present time, the drivers also report directly to the Distribution Center Ops Manager.

⁶ Although the record is not entirely clear, it appears that the reason Perez earns so much more than the other plant clericals is that she shares an office with the Employer's Accounting Internal Auditor and she has accounting functions as part of her regular job duties.

⁷ As reflected on Employer Exhibit #3, the twelve current Class A drivers actually earn from \$17 to \$24.52 an hour, with the vast majority earning in the \$17 to \$19 range.

However, the Employer provided testimony that there is a vacant position of Transportation Manager that it is attempting to fill, and that as soon as it fills that position, the drivers (and no one else) will report directly to that Transportation Manager. While the testimony reflected that the warehouse employees, the plant clericals, and the drivers are all ultimately responsible to the Distribution Center Director, the top management position, that is also true for all of the other employee classifications at the facility, including employees in the Construction and Maintenance Departments that all parties agree should not be part of any unit I find appropriate herein. Based on the above, I find that the record reflects that day-to-day immediate supervision and control of matters of interest to the drivers are handled by different supervisors than those to whom the warehouse associates and plant clericals report.

C. Conclusion Regarding the Drivers, Plant Clericals, and Warehouse Employees

A review of the community of interest factors demonstrates that the petitioned-for unit of drivers is an appropriate unit for the purpose of collective-bargaining. In so finding, I do recognize that there is a certain degree of functional integration between the drivers and the warehouse associates, as the drivers depend on the warehouse associates to load their trucks and this integration comes full circle when the drivers return to the facility and the warehouse associates essentially check in their vehicles. There is also some functional integration between the work of the drivers and the plant clericals, as the drivers are dependent on the plant clericals to process much of the necessary paperwork generated in their work. Yet, functional integration is but one of the elements to consider when analyzing community of interest. I find that when all factors are considered together, the lack of significant interchange, the lack of common supervision, the lack of common skills and functions, nominal daily contact and the lack of common wages, hours and other working

conditions, outweighs other factors such as the basic functional integration and any minimal similarities the three classifications have. Thus, I find the separate petitioned-for unit of drivers to be appropriate.

In support of this conclusion, I note that there are many examples of the Board finding a unit of drivers to constitute an appropriate unit apart from warehouse or production or clerical employees. See *Overnite Transportation Co.*, 325 NLRB 612 (1998) (Board found that mechanics did not need to be included in a unit consisting of drivers where the employer argued the existence of functional integration between drivers and mechanics, drivers reported problems to mechanics, and mechanics performed limited driving); *Triangle Building Products Corp.*, 338 NLRB 257 (2002) (Driver unit found appropriate where drivers spent a majority of time away from the Employer's facility; contact with other employees is limited; joint supervision was limited); *Mc-Mor-Han Trucking*, 166 NLRB 700, 701 (1967) (Board found drivers had a sufficient community of interest separate and apart from a group of mechanics); *Overnite Transportation Co.*, 331 NLRB 662 (1999) (Drivers excluded from plant-wide unit where they spent most of their time away from the facility; limited evidence that drivers performed work at the facility; limited evidence that other employees performed driving); *Office Depot, Inc.*, 184 F.3d 506 (6th Cir. July 2, 1999) (Driver unit found appropriate where drivers spend their time away from the facility; drivers have their own training; drivers do not perform work of warehouse employees except when placed on light duty; and interchange was rare).

In finding a separate unit of drivers to be appropriate in spite of the functional integration of the Employer's operations, I do not find controlling any of the cases to the

contrary that have been cited by the Employer on brief. Thus, in *Overnite Transportation*, 322 NLRB 347 (1996), unlike the instant case, the petitioner sought a unit of drivers and warehousemen. In its decision directing an election in that unit, the Board found only that this was an appropriate unit, not that it was the only appropriate unit or even the most appropriate unit. Similarly, in *Mayfield Produce Co.*, 290 NLRB 1083 (1988), the Board issued a bargaining order in a unit of both warehousemen and drivers because this was the unit in which the organizing drive had been conducted and the Board determined that it was an appropriate unit.⁸ By contrast, in the instant case, Petitioner seeks an election in a unit that is limited to drivers. In directing an election in that petitioned-for-unit, I am concluding only that this is an appropriate unit.

D. Must the Driver's Unit Include the Four Bobtail Drivers?

Having concluded that the petitioned-for unit consisting of all Class A drivers employed at the Employer's Milpitas, California facility constitutes an appropriate unit, the only remaining issue is whether this unit must also include four employees who spend some portion of their working day driving the Employer's bobtail trucks. At the hearing, the parties disagreed about the unit placement of these four drivers. The Employer took the position that because they are all drivers, all four of the bobtail drivers must be

⁸ *Avon Products, Inc.*, 250 NLRB 1479 (1982), another case relied upon by the Employer on brief, is also readily distinguishable. In that case, the petitioner sought a combined unit of production, plant clerical and maintenance employees. However, it sought to exclude employees employed in certain specified classifications within this combined unit. In holding that the excluded classifications should be included in the unit, the Board reasoned that the production process was a single highly integrated process and the employees in the excluded classifications shared common skill levels, supervision, and a community of interest with the employees sought to be included. In short, the Board in *Avon* found simply that there was no rational basis to include certain production, maintenance, and clerical classifications while excluding employees employed in other such classifications. By contrast, the instant case involves whether employees in the functionally distinct classifications of warehousemen and plant clericals must necessarily be included in a unit of employees in the functionally distinct classification of driver. Since the record is clear that the drivers do not share common skill levels and supervision with the warehouse and clerical employees and there is insufficient evidence of employee interchange and contact between those classifications, I find that the petitioned-for separate drivers unit is an appropriate unit.

included in any drivers' unit I find appropriate herein. At the hearing, the Union stated that it did not know what its position was regarding whether the two Class B drivers (Cesar Gonzalez and Rafael Barragan) should be included in the driver's unit. However, it did state at the hearing that it believed that Class C drivers Juan Caballero and Jose Carlos Juarez should not be included in the unit, since they possess neither a Class A nor a Class B license and they spend the bulk of their time doing warehouse work rather than driving. However, on brief, Petitioner modified its position, and now asserts that Gonzalez, Barragan, and Caballero should be included in the drivers' unit since they all regularly perform driving duties. On brief, Petitioner did not take a position one way or the other regarding Juarez's eligibility.

With regard to Gonzalez and Barragan, the record reflects that because they lack a Class A license, they cannot drive one of the Employer's 53 foot long tractor trailers. Instead, they are limited to driving one of the Employer's twenty five foot bobtail trucks with air brakes. The record reflects that Barragan reports to work five days a week at 2:30 a.m. He spends the first half of his workday helping to load the bobtail truck. After it is loaded, Barragan spends the last half of his shift out on the road making deliveries to the Employer's retail stores. Gonzalez reports to work each day at 3:00 p.m. He spends the first half of his shift helping to load the bobtail truck. Like Barragan, he spends the second half of his shift out on the road making deliveries.

The record evidence reflects that the Employer uses its bobtail trucks in substantially the same way it uses the tractor trailers. Thus, on a daily basis the bobtail trucks are used to make the entire delivery to certain of the retail stores where the loading dock area is too small to accommodate a 53 foot tractor trailer, and they are used to

deliver “overflow” pallets that do not fit on the regular tractor trailer going to a particular retail store. The bobtail trucks are also used on occasions where there is a need to deliver refrigerated goods to a retail store, such as food for taco stands that are set up whenever the Employer stages a carnival at a retail store. Finally, these trucks are used to deliver “hot shots,” which are emergency deliveries of a pallet or two to a particular store, usually on a weekend.

The two Class B drivers have job duties that fall somewhere between the duties of the Class A drivers and the warehouse employees. Thus, like the warehouse employees, the Class B drivers help load the bobtail trucks before each delivery. However, like the Class A drivers, once they drive away from the Distribution Center, they are out on the road and their job duties in other ways are remarkably similar to those of the Class A drivers. Thus, the Class B drivers drive their truck to one of the Employer’s retail stores, they unload the truck, they check the quantity and quality of the delivery with the store’s receiving clerk, and they pick up cardboard, empty pallets, and any returns from a previous delivery and bring them back to the Distribution Center. Like the Class A drivers, once they leave the Distribution Center, they are off on their own and have no contact with the warehouse employees, other than to use a Blackberry to report their location to the plant clericals. Finally, like the Class A drivers, the Class B drivers are subject to DOT regulations and drug testing, and they have to fill out the same truck inspection forms and driver log books/timesheets.

Based on the above-facts, it would appear that both Barragan and Gonzalez are dual-function employees who spend a portion of their working day performing unit work as drivers, and a portion of their day performing non-unit warehouse work. The test for

determining the voting eligibility of dual-function employees is whether they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. See *Harold J. Becker Co.*, 343 NLRB 51 (2004); *Medlar Electric, Inc.*, 337 NLRB 796 (2003); *Ansted Center*, 326 NLRB 1208 (1998). As detailed above, the record reflects that both Barragan and Gonzalez spend at least half of their working time driving the bobtail truck. In *Medlar Electric*, supra, the Board found that a warehouse employee who spent 25 to 30 percent of his time driving a truck had a substantial interest in the working conditions of the employees in the drivers unit and was therefore eligible to vote as a dual-function employee. Based on this reasoning, I find that Barragan and Gonzalez are eligible to vote in the drivers unit as dual-function employees.

With regard to the eligibility of Juan Caballero, the record reflects that in the past Caballero spent some undisclosed part of his working time using the 25 foot bobtail truck without air brakes to make deliveries to the Employer's retail stores. Caballero possesses only a Class C license, which is the ordinary non-commercial license required to drive a passenger car. DMV regulations permit anyone with a regular driver's license to drive the 25 foot bobtail truck without air brakes. However, Caballero is not subject to DOT regulations, he is not required to undergo random drug testing, and he does not have to maintain or turn in vehicle inspection reports.⁹ The record reflects that Caballero spends the bulk of his working day working in the warehouse. Employer Exhibit #1, the Organization Chart, lists Caballero as a "DC Selector," a member of the Employer's

⁹ Hector Salas, the Employer's Human Resources Director, testified that he does not know if Caballero has to undergo the driver safety training classes and safety checks. No other testimony was elicited on this subject.

Organization Team, rather than as a driver. As such, Caballero reports directly to Carlos Juarez, the head of Quality Control, rather than to the Transportation Manager. The record further reflects that Caballero's main job is doing warehouse work, and he spends most of his time selecting orders, organizing things in the warehouse, and handling the products that the retail stores send back to the Distribution Center. Most importantly, the Employer offered into evidence Employer Exhibit #19, a "Transfer & Rate Change Form," which shows that on August 8, 2008, Caballero was officially transferred from a position as a driver to an order selector position. This form further states that Caballero "won't be working as driver anymore." The record is unclear whether, in spite of this document, Caballero has, in fact, driven the bobtail truck on occasion subsequent to August 8, 2008.

Based upon the above facts, Caballero's eligibility to vote must be determined by examining whether he regularly performs duties similar to those performed by unit employees for sufficient periods of time to demonstrate that he has a substantial interest in working conditions in the unit. On brief, in spite of the vague and conflicting record evidence on this issue, both Petitioner and the Employer assert that Caballero regularly performs driving duties and therefore should be eligible to vote. Because the parties are in agreement that Caballero should be eligible to vote, I will not look behind this agreement and I will allow Caballero to vote in the election I am directing herein.

On brief, Petitioner has taken no position regarding whether Jose Carlos Juarez should be eligible to vote. For its part, on brief the Employer has asserted that Juarez "regularly drive(s) the bobtail truck" and should be included in the drivers unit. However, there is really no evidence in the record to support the Employer's assertion.

Thus, Employer Ex. #3, the list of all distribution center employees, lists Juarez as a "DC selector," rather than as a DC driver. Similarly, Employer Ex. #1, the Employer's organization chart, lists Juarez as a quality control employee. The only testimony regarding Juarez's alleged driving duties came from HR Director Hector Salas, the Employer's only witness. Salas testified that although he does not know Juarez personally, he does "know of him." Then, in response to the leading question from the Employer's attorney "Does he (Juarez) generally perform the same functions as Mr. Caballero?," Salas said "Yes." It is unclear whether this "generally performs the same functions" statement encompasses driving the bobtail truck without air brakes as opposed to working in the warehouse. Finally, I note that when driver Ricardo Mendez was asked specifically whether he had ever seen Juarez drive a bobtail, he answered "no." Accordingly, since both parties do not agree that Juarez should be eligible, and since there is no record evidence supporting the Employer's assertion that Juarez ever drives the bobtail truck, I shall exclude Juarez from the driver's unit in which I am directing an election herein.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.¹⁰

3. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time transport drivers employed by the Employer at its Milpitas, California facility; excluding all other employees, guards, and supervisors as defined in the Act.

There are approximately 15 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by International Brotherhood of Teamsters Local 853, a/w Change To Win. The date, time, and place of

¹⁰ The parties stipulated that the Employer, a California corporation with its main office located in San Jose, California, is engaged in the operation of retail grocery markets throughout the San Francisco Bay Area and in Northern California. During the past twelve months, the Employer has received gross revenues in excess of \$500,000 and during that same period has directly purchased and received goods or services valued in excess of \$5,000 directly from suppliers located outside the State of California.

the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in each unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with

them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for each of the separate collective bargaining units, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). Each list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to the Petitioner.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **November 8, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹¹ by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of the list will continue to be placed upon the sending party.

¹¹ To file the eligibility list electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronically, in which case only **one** copy need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on

November 15, 2010. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,¹² but may **not** be filed by facsimile.

Dated: November 1, 2010


Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

32-1370

¹² To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

POSTING OF NOTICE OF ELECTION

PART 193 - OTHER RULES

1. The authority citation for 29 CFR Part 163 is revised to read as follows:

Authority. Sec. 6 National Labor Relations Act as amended (29 U.S.C. 151, 158) and Section 553 of the Administrative Procedure Act (5 U.S.C. 500.553).

2. Part 103 is amended by adding Subpart B, consisting of Sec. 103.20 to read as follows:

Subpart B - Election Procedures

Sec. 103.20 Posting of Election Notices

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Sec. 102.69(a).